IN THE COURT OF APPEAL OF TANZANIA

AT DAR ES SALAAM

(CORAM: NDIKA, J.A., KITUSI, J.A., And RUMANYIKA, J.A.)

CIVIL APPEAL NO. 53 OF 2019

ASANTERABI MKONYI ..... APPELLANT

VERSUS

TANESCO ..... RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Tanzania, Labour Division at Dar es Salaam)

(Nyerere, J.)

dated the 7th day of December, 2018
in
Revision No. 485 of 2017

.....

JUDGMENT OF THE COURT

15th February & 7th March, 2022

NDIKA, J.A.:

The appellant, Asanterabi Mkonyi, appeals against the judgment of the High Court of Tanzania, Labour Division (Nyerere, J.) dated 7th December, 2018 in Revision No. 485 of 2018 overturning the award dated 21st September, 2017 made in his favour by the Commission for Mediation and Arbitration ("the CMA").

Briefly, the appellant was employed by the respondent, Tanzania Electric Supply Company Limited, on various monthly specific task/fixed term contracts (Exhibit D1) as a Telephone Operator between 8th

November, 2012 and June, 2015. He was attached to the Emergency Maintenance Unit at Tabata, Ilala, Dar es Salaam, charged with receiving calls from customers on emergency cases requiring urgent technical support. It occurred sometime in May 2015 that a complaint arose that he had mishandled a customer's call for emergency technical support. In response, the respondent served him a letter dated 8th June, 2015 (Exhibit P2) demanding a show of cause within three days of receipt of the letter as to why disciplinary action should not be taken against him for mishandling the call. The appellant duly furnished a reply dated 11th June, 2015 (Exhibit P3) strenuously denying the accusation.

There was a sharp disparity between the parties as to what was the aftermath of the appellant's aforesaid submission of his statement. According to the respondent's version put up by its sole witness, one Faika Mamuya, a Human Resources Officer, the appellant ceased reporting for duties from 12th June, 2015, a day after he submitted his statement and that the appellant's next move was referring the matter to the CMA on 7th August, 2015. Denying that the respondent terminated the appellant's contract, she said that no letter of termination was ever issued. She was insistent that the appellant was not an employee on permanent terms but on a specific task/fixed term contract.

On the other hand, the appellant, adducing evidence as PW1, averred that after he submitted his statement, he was terminated by the respondent, a fate that also befell his three former co-employees including Ibrahim Msafiri (PW2). He bewailed that the termination was communicated orally by the respondent's Human Resources Office and that no valid reason for the termination was mentioned. On the part of PW2, his evidence materially supported the appellant's claim.

In its award, the CMA took the view that the central issue in the matter was whether the appellant was terminated from his employment. In resolving the issue, the arbitrator took into account the respondent's evidence that the appellant absconded from work but that no disciplinary process was initiated against him for the alleged abscondment. He gave full credence to the appellant's evidence, supported by his former co-employee (PW2), that he was dismissed from his job. In the premises, the arbitrator upheld the appellant's claim, finding that his termination was substantively and procedurally unfair. Accordingly, he ordered the appellant's reinstatement in his employment in terms of section 40 (1) (a) of the Employment and Labour Relations Act, Cap. 366 (R.E. 2019) ("the ELRA").

Resenting the aforesaid outcome, the respondent applied to the High Court for a revision of the award on three grounds, which we need not reproduce herein. In its judgment, the High Court (Nyerere, J.) overruled the arbitrator's finding that the appellant was on permanent terms and that he had to be subjected to a disciplinary hearing on the accusation of abscondment. She found it certain that the appellant had been employed on a specific task contract which terminated at the end of the predetermined task or expiry of the fixed time. She relied on a decision of that court in **Mtambua Shamte & 64 Others v. Care Sanitation and Suppliers**, Revision No. 154 of 2010 (unreported) where it was held:

> *"Now, the principles of **unfair termination** under the Act do not apply to **specific tasks or fixed term** contracts which come to an end on the specified time or completion of a specified task. Under the latter, such principles apply under conditions specified under section 36 (a) (iii) read together with Rule 4 (4) ... of the Code. Such conditions are said to exist where 'an employee reasonably expects a renewal ....' Where such expectation exists, termination of employment must be fair as defined under the whole of section 37 of the Act."*

Following the above decision, Nyerere, J. concluded, as shown at page 171 of the record of appeal, thus:

> *"... it is the holding of this court that the respondent [Asanterabi Mkonyi] was a Specific Task Employee. The employer was not obliged to call for a disciplinary hearing after the employee had absented himself from work. The fact that the respondent was a specific task employee and he absconded from work on his own free will, i.e., not terminated, he had no right to claim fairness of termination as held by the Hon. Arbitrator. Despite the fact that the respondent secured several employment contracts on a specific task basis as shown on record, this in itself did not automatically make him a permanent employee, thus unfair termination benefits do not apply to him."*

Ultimately, the High Court vacated the CMA's award and ordered the respondent to pay the appellant the outstanding remuneration for the days worked between 1st and 12th June, 2015, if any.

The appeal was initially predicated upon five grounds of complaint. However, at the hearing of the appeal, it became clear, after the appellant had abandoned the third and fourth grounds, that the focal point of the

dispute between the parties narrowed down to whether the principles of unfair termination applied to the appellant's employment with the respondent.

Arguing in support of his appeal, the appellant censured the High Court for holding that the principles of unfair termination were inapplicable to his termination. He boldly contended that the said finding was at war with the evidence on record that he had reasonably expected a renewal of his contract in terms of section 36 (a) (iii) of the ELRA. In this respect, he cited the evidence that he worked for the respondent on numerous one-month fixed term contracts from 2012 until his abrupt termination in June, 2015 without any valid reason and fair procedure. We understood him to be pegging his expectation of a renewal on the evidence that his fixed term contract was incessantly rolled over; that it was renewed by the respondent after the expiry of each term.

Replying, Mr. Howa Hiro Msefya, learned State Attorney, who was accompanied by Mr. Steven Urassa, also learned State Attorney, contended that it was undoubted on the evidence that the appellant absconded from work from 12th June, 2015 and that no proof of the alleged termination of employment was proffered. Having referred to the

case of **Mtambua Shamte** (*supra*) on the application of the principles of unfair termination of employment, he argued that the appellant's abscondment from employment negated the claim that he had reasonable expectation of renewal of his fixed term contract. Accordingly, he supported the High Court's verdict and urged that the appeal be dismissed.

Rejoining, the appellant emphasized his claim to reasonable expectation of renewal of his contract of service with the respondent and repeated his contention that the High Court erred in disapplying the principles of unfair termination from his case.

We have examined the record of appeal and considered the contending written submissions and oral arguments for and against the appeal. In resolving the contentious issue at hand, we find it essential and logical to reproduce section 37 of the ELRA, which falls under Sub-Part E of that Act.

> *"**37**.-(1) It shall be unlawful for an employer to terminate the employment of an employee unfairly.*
>
> *(2) A termination of employment by an employer is unfair if the employer fails to prove-*

(a) that the reason for the termination is valid;

(b) that the reason is a fair reason-

(i) related to the employee's conduct, capacity or compatibility; or

(ii) based on the operational requirements of the employer, and

(c)that the employment was terminated in accordance with a fair procedure."

The above provision creates the concept of unfair termination of employment by defining "unfair termination of employment" as a termination where the employer fails to prove that the termination was for a valid and fair reason and that fair procedure was followed. However, section 36 of the ELRA limits the application of this concept to "termination of employment" as defined thereunder:

*"**36**. For purposes of this Sub-Part-*

(a) "termination of employment" includes-

(i) a lawful termination of employment under the common law;

(ii) a termination by an employee because the employer made continued employment intolerable for the employee;

(iii) ***a failure to renew a fixed term contract on the same or similar terms if there was a reasonable expectation of renewal;***

(iv) *a failure to allow an employee to resume work after taking maternity leave granted under this Act or any agreed maternity leave; and*

(v) *a failure to re-employ an employee if the employer has terminated the employment of a number of employees for the same or similar reasons and has offered to re-employ one or more of them;"*

[Emphasis added]

What is relevant to the present matter is section 36 (a) (iii) above to which we have deliberately supplied emphasis. This provision sanctions the application of the concept of unfair termination to employment on a fixed term contract in case of failure to renew such a contract on the same or similar terms only if it is established that there was a reasonable expectation of renewal. Certainly, where such expectation does not exist the concept will not apply. It is noteworthy that this limitation is restated by rule 3 (3) of Employment and Labour Relations (Code of Good Practice)

Rules, 2007, Government Notice No. 42 of 2007 ("the Code"). In the same vein, rule 4 (4) of the Code, stipulates that:

> *"(4) Subject to sub-rule (3), the failure to renew a fixed-term contract in circumstances* ***where the employee reasonably expects a renewal of the contract may be considered to be an unfair termination.****"* [Emphasis added]

In view of the foregoing, it is our view that the High Court was correct in its holding in this matter, premised on its earlier decision in **Mtambua Shamte** (*supra*), that the principles of unfair termination do not apply to a fixed-term contract (or even a special task contract) unless it is established that the employee reasonably expected a renewal of the contract. It is instructive to note that in terms of rule 3 (4) (a) and (b) of the Code, a fixed-term contract exists where the agreement to work is for a fixed time or upon completion of a predetermined task while a contract is for a permanent term where the agreement to work is without reference to time or task – see also **Mtambua Shamte** (*supra*).

Coming to the phrase "reasonable expectation of renewal," it is striking that the ELRA does no define it. Thus, an employee's expectation of renewal would be open to interpretation by courts depending on the

circumstances of the case upon an objective basis. In **Dierks v. University of South Africa** (1999) 20 ILJ 1227, the Labour Court of the Republic of South Africa restated some of the factors that had been considered in various cases in determining whether a reasonable expectation of renewal has come into existence in terms of section 186 (b) of the Labour Relations Act 66 of 1995. The Court observed, in Para. 133 of the judgment, that:

> *"[133] A number of criteria have been identified as considerations which have influenced the findings of past judgments of the Industrial and Labour Appeal Courts. These include an approach involving the evaluation of all the surrounding circumstances, the significance or otherwise of the contractual stipulation, agreements, undertakings by the employer, or practice or custom in regard to renewal or re-employment, the availability of the post, the purpose of or reason for concluding the fixed term contract, inconsistent conduct, failure to give reasonable notice, and nature of the employer's business."*

We think the above criteria would equally hold true in our jurisdiction.

As stated earlier, in arguing that he had a reasonable expectation of renewal of his last contract, the appellant stressed that his employer had continuously rolled over his monthly contract for close to three years between 8th November, 2012 and June, 2015. It occurs to us that when a contract has been rolled over on numerous occasions, the employee can rightly expect a renewal after the effluxion of time of the last contract, all things being equal. We are cognizant that while in terms of rule 4 (2) of the Code a fixed-term contract terminates automatically when the agreed period expires, in line with rule 4 (3) of the Code the contract may be renewed by default if the employee continues for work after the expiry of the agreed term and if circumstances warrant it. Nevertheless, we think that in the instant case the appellant's undisputed abscondment from work was conduct which was inconsistent with the alleged expectation. It was uncontroverted that the appellant absconded from work from 12th June, 2015 and then resurfaced after instituting his unfair termination claim in the CMA on 7th August, 2015. In his absence, his last contract ran its course and expired. Even then, according to DW1, as revealed at page 66 of the record of appeal, the appellant was subsequently asked to resume service but he refused. Thus, his claim that he had reasonable expectation

of renewal of the last contract is plainly implausible and unjustified. It was negated by his abscondment.

In conclusion, we find no merit in the appeal, which we hereby dismiss. We make no order on costs as this matter, being a labour dispute, is not amenable to awards of costs.

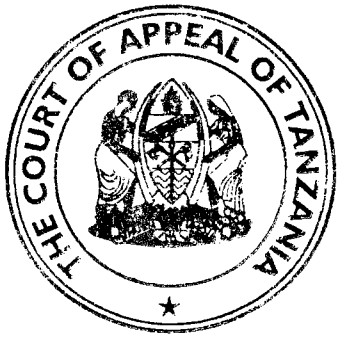
DATED at **DAR ES SALAAM** this 1st day of March, 2022.

G. A. M. NDIKA
JUSTICE OF APPEAL

I. P. KITUSI
JUSTICE OF APPEAL

S. M. RUMANYIKA
JUSTICE OF APPEAL

The Judgment delivered this 7th day of February, 2022 in the presence of Appellants in person and M/s Rose Kashamba, State Attorney for the Respondents is hereby certified as a true copy of the original.



F. A. MTARANIA
DEPUTY REGISTRAR
COURT OF APPEAL